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No. 81-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

MARY T. GRACE, ET AL.,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, AMICI CURIAE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, AMICI CURIAE

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) and the American Civil Liberties Union Fund of the National Capital Area (ACLU Fund), with the consent of the parties, jointly file this brief in support of appellees.[1] We urge this Court to affirm the judgment of the court below, *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981), holding that 40 U.S.C. § 13k (1976) is unconstitutional under the First Amendment.

The ACLU is a nationwide, non-partisan, non-profit membership organization of over 250,000 members which

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[1] Written consents by all parties to the filing of this Brief have been lodged with the Clerk of the Court.

for more than 60 years has been dedicated to the protection of personal liberty through a vigorous defense of the fundamental principles embodied in the Bill of Rights, especially the First Amendment. The ACLU Fund is the litigation arm of the ACLU in the Washington, D.C. area. Both the ACLU and the ACLU Fund have appeared frequently in the federal courts as counsel for parties and as amicus in First Amendment cases involving freedom of expression and association. For example, the ACLU appeared before this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

The ACLU Fund has been particularly active in establishing and protecting the free speech rights of demonstrators near government buildings in Washington, D.C. The Fund has successfully argued in support of those seeking to exercise their First Amendment rights on the grounds of the Capitol, *see Dellums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), and *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (3-judge court), *aff'd mem.*, 409 U.S. 972 (1972), as well as at the White House, *see A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969), and *Saffron v. Wilson*, 481 F. Supp. 228 (D.D.C. 1979), *aff'd mem.*, No. 79-2236 (D.C. Cir. Dec. 9, 1980).

This case involves a statute virtually identical to the one held unconstitutional in *Jeannette Rankin Brigade v. Chief of the Capitol Police, supra.* The statute absolutely prohibits certain speech and expressive conduct anywhere on the Supreme Court grounds. The importance of this case rests in substantial part on this Court's role as one of the three co-equal branches of our national government. Similarly broad prohibitions of expression have been held unconstitutional with respect to the Capitol and the

White House. Amici believe that the First Amendment applies with equal force here and that its protections do not stop at the curb of the Supreme Court sidewalk. In light of this Court's central role in protecting the constitutional rights of our nation's citizens, including freedom of expression, it would be ironic indeed if such an absolute prohibition were to be upheld with respect to the Supreme Court grounds. Accordingly, this Brief is submitted in support of the position of appellees.

SUMMARY OF ARGUMENT

This case presents the question whether 40 U.S.C. § 13k, which absolutely prohibits a wide variety of expressive activity on the grounds of the Supreme Court, is unconstitutional under the First Amendment. The case comes to this Court from a decision of the United States Court of Appeals for the District of Columbia Circuit that held the statute unconstitutional. *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981). We believe that, under the First Amendment analysis consistently applied by this Court, the decision of the Court of Appeals was correct and its judgment should be affirmed.[2]

Section 13k is not, as the Government argues, a mere restriction of the time, place, or manner of expression. The statute prohibits any parading, standing, or moving in processions or assemblages as well as the display of "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Expression falling within the disfavored classification is not merely regulated but is absolutely prohibited at any time or in any manner anywhere on the Supreme Court grounds. This restriction represents a substantial intrusion upon protected First Amendment rights. In forcing leafleters and demonstrators to use sites other than the

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[2] Like the court below, we do not suggest that any individual may picket or leaflet in the Supreme Court building itself. *Grace v. Burger*, 665 F.2d at 1205. Because the statute broadly prohibits expression throughout the Court's grounds (and not only in the Supreme Court building), it clearly is unconstitutionally overbroad.

Court grounds, section 13k significantly reduces their ability to convey their message to their intended audience.

Congress does not have unfettered discretion to prohibit expression on the grounds of the Supreme Court or any other public property. Such restrictions must be justified on the basis of compelling governmental interests and must be no broader than necessary to serve those interests. The prohibition of section 13k sweeps far too broadly to pass constitutional muster. Although the Government argues that the statutory ban is required in order to prevent expressive activity from influencing, or appearing to influence, this Court in the administration of justice, section 13k extends far beyond what is necessary to accomplish that goal. It proscribes expression, including actions of a single leafleter or demonstrator, that even the Government concedes "will usually not create an actual danger of real or perceived intimidation of the judiciary." Gov't. Br. 25 n.9. Although the Government continues to argue that section 13k is less restrictive than other alternative approaches, the Government's position stands traditional First Amendment analysis on its head. In fact, there are a number of less restrictive alternatives available that fully protect the Government's interest, including an existing criminal statute, 18 U.S.C. § 1507 (1976), which is virtually identical to the statute this Court upheld in *Cox v. Louisiana*, 379 U.S. 559 (1965).

Nor is section 13k justified by the Government's purported interest in preserving the symbolic value of the grounds of this Court. Similar restrictions have been struck down with respect to the Capitol and White House grounds, and nothing in the legislative history of section 13k indicates that Congress believed that the grounds of this Court uniquely require such a complete ban on expression. But even if Congress did intend thereby to protect symbolic values, that purpose is insufficient to justify the broad restrictions on First Amendment rights imposed by section 13k.

ARGUMENT

40 U.S.C. § 13k IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

This Court's decision in *Cox v. Louisiana*, 379 U.S. 559 (1965) (*Cox II*), makes clear that section 13k is unconstitutional.[3] In *Cox II* the Court upheld a Louisiana statute that prohibited picketing or parading near a courthouse with the intent of interfering with or otherwise influencing any judge or court officer in the administration of justice. Unlike section 13k, the statute at issue in *Cox II* was not a broad prohibition of all demonstrative conduct but a narrowly drawn regulation designed to prevent a specific harm. In upholding the statute, this Court recognized the state's compelling interest in protecting the "judicial process" by preserving the actual and apparent impartiality of its judiciary. 379 U.S. at 562. But the Court cautioned that the state's interest, although substantial, was narrow and would not support a broad prohibition of expressive conduct. *Id.* at 567.

As *Cox II* and other decisions by this Court make clear, governmental restrictions on speech and expressive conduct will be sustained only if they are narrowly drawn to serve a compelling governmental interest.[4] *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *Bates v. City of Little*

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[3] 40 U.S.C. § 13k provides:

> "It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement."

[4] "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). *See Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

Rock, 361 U.S. 516, 524 (1960). Thus, a restriction on speech or expressive conduct cannot survive if there are alternatives that are less restrictive of speech and expression and that serve the same purposes.[5] *Kusper v. Pontikes*, 414 U.S. at 59; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). And it is the Government that bears the burden of demonstrating that its interest cannot be protected adequately by more limited regulation of expression.[6] *Buckley v. Valeo*, 424 U.S. at 25; *Elrod v. Burns*, 427 U.S. at 362. As we demonstrate below, the Government has failed to carry its burden.

A. Section 13k Significantly Restricts the Exercise of First Amendment Rights by Prohibiting All Demonstrative Speech and Conduct on the Supreme Court Grounds.

Statutes that prohibit speech altogether "stand on a different footing" from statutes that merely regulate the time, place, or manner of speech. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 93. Section 13k is an absolute prohibition; it bars all demonstrative speech or conduct on the Supreme Court grounds and imposes substantial burdens on anyone seeking to communicate with those who visit or transact business in this Court.[7] The Government argues that those burdens

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[5] "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."

Kusper v. Pontikes, 414 U.S. 51, 59 (1973) (citations omitted).

[6] Nor do these principles vary if the restriction is limited to governmental property. *See* pp. 13-14 *infra*.

[7] The Government characterizes the statute as prohibiting only public demonstrations, picketing and leafleting. *See* Gov't. Br. 13. But the statute in fact is considerably broader in its reach. It prohibits the "display [of] any flag, banner, or device designed or

are "minimal" (Gov't. Br. 13), because there exist alternative forums for such expression—for example, the area across the street from the Court—and that section 13k is, for this reason, merely a permissible regulation of time, place, and manner. This argument misses the mark, however, because no alternative mode or place of communication is available that would permit appellees and others reasonably and effectively to reach their intended audience.[8]

In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 93, this Court identified the factors that determine whether there exist reasonable alternatives for speech and expression sufficient to sustain an asserted restriction of time, place or manner. Such an alternative, first, must be as effective in conveying the speaker's intended message. *Cf. Cohen v. California*, 403 U.S. 15, 25-26 (1971). Moreover, the alternative must permit the

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adapted to bring into public notice any party, organization, or movement." 40 U.S.C. § 13k. During the proceedings before the Court of Appeals the Government's counsel admitted that the statute appears to prohibit, among other things, the wearing of a lapel button displaying a miniature flag of the United States. *Grace v. Burger*, 665 F.2d at 1194 n.2. *Compare Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. at 586 n.13.

[8] The Government's approach would convert any restriction of speech into a mere regulation of time, place, or manner. Even a complete prohibition of expression in Washington, D.C. for example, could be characterized as a restriction of time, place, or manner if the relevant "place" were the eastern United States. The distinction lies in the purpose to be served by the speech and, whether, in light of that purpose, the alternatives are reasonable by virtue of being functionally interchangeable with the time, place or manner that is prohibited. *See Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. at 93 (and cases cited therein). Here, because of the unique importance of the Court and the other reasons discussed below (pp. 8-11 *infra*), it is clear that there is no effective substitute for demonstrative conduct on the grounds of this Court. *See A Quaker Action Group v. Morton*, 516 F.2d 717, 733 & n.49a (D.C. Cir. 1975); *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 342 F. Supp. at 583-85. Section 13k thus operates as an absolute prohibition of expression.

speaker to reach the intended audience as readily. *Cf. United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring). Finally, restricting the speaker to the alternative site or method of communication must not significantly increase the burdens on the exercise of First Amendment rights. *Cf. Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943); *Kovacs v. Cooper*, 336 U.S. 77, 102-03 (1949) (Black, J., dissenting).

Applying these factors, it is clear that the opportunity to picket or leaflet across the street from the Court is insufficient to ameliorate the substantial burden that section 13k imposes on protected speech. Section 13k significantly reduces the likelihood that speakers and other demonstrators will be able readily to convey their message to their intended audience, and it thus imposes an impermissible burden upon the exercise of their First Amendment rights. To be sure, demonstrators positioned across the street from the Court could be seen by some of those entering and leaving the Supreme Court grounds.[9] But mere knowledge of the *presence* of demonstrators does not assure knowledge of the *reason for their presence*. Such knowledge may completely escape observers on the Supreme Court grounds. Not only will speakers stationed across the street be able to communicate with fewer people, but it is undoubtedly more difficult and more costly to design signs or placards large enough to communicate the message to distant onlookers.

More significantly, the absence of oral communication or the opportunity to hand a leaflet or brochure to a passerby often will seriously impede the opportunity to convey the intended message. Indeed, there is no assurance that those who are present on the grounds of the Court will even be aware that the message from across the street is

[9] Apparently, this is what the Government intends by its assertion that, had appellees chosen to exercise their First Amendment rights across the street from the Court, "few . . . would have mistaken their point." Gov't. Br. 15.

directed at them. Unlike the fairground booths that the Court found to be an acceptable time, place, and manner restriction in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the alternative site that the Government offers here is separate from and not contained within the Supreme Court grounds. It is not an area "where visitors [to the Supreme Court] are expected and indeed encouraged to pass." *Id.* at 655 n.16.

The Government's analysis is unpersuasive because it simply ignores the reasons why the ability to communicate directly and effectively with those who visit the Court may be crucial. Contrary to the Government's arguments, speakers whose message is unrelated to the case-deciding function of this Court do *not* have "far less of an interest" in being on Court grounds. Gov't. Br. 14. As the "apex of our judicial system," (Gov't. Br. 38 n.16), this Court serves as a focal point for the activities of a unique group of people: parties and their counsel; news media; and lawyers, tourists, and others who visit the Court. This is a largely self-selected target audience, with whom a wide variety of speakers may wish to communicate about particular issues likely to be of interest to them. For example, appellee Mary Grace, a lone picketer, carried a sign containing the words of the First Amendment. It is reasonable to suppose that those who visit this Court constitute an audience that is particularly conversant with the language and spirit of the First Amendment and therefore receptive to the intended message.[10] Burdens on access to this audience are hardly "minimal."

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[10] The Government also asserts that, because the Court deals with a broad range of important public issues and because those with a message *wholly unrelated* to the Court's functions are not likely to demonstrate at the Court, section 13k does not have a significant impact on protected speech. Gov't. Br. 27-29. The implication of the Government's argument, that *Cox II* allows an absolute prohibition of any speech on courthouse grounds that is *at all* related to the functioning of a particular court or to the judiciary in general, is false. *Cox II* upheld only a narrow restriction of expression intended

Indeed, the ability to reach this audience is of no less practical or constitutional importance than the ability to reach non-judicial officers in a state courthouse was in *Cox II*. *Cox II* makes clear that expressive activity near a courthouse may be directed at listeners other than judges and that such conduct is entitled to a high degree of constitutional protection. The Court emphasized that

> "entirely different considerations would apply if, for example, the demonstrators were picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building." [11]

379 U.S. at 567.

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to prevent actual or apparent interference with any "judicial proceedings." 379 U.S. at 567.

In fact, there are other speakers with other messages unrelated to the Court's case-deciding function for whom persons on the grounds of this Court would be a particularly appropriate audience. For example, those advocating increases—or decreases—in federal appropriations for legal services for the poor might well specially value the opportunity to advocate these positions on Supreme Court grounds. So too might speakers urging positions respecting pending proposals to restrict the jurisdiction of federal courts, speakers urging the establishment of a National Court of Appeals (or similar entity) to reduce the Supreme Court's workload, or speakers (like appellee Thaddeus Zywicki here) expressing views on the number and qualifications of judges in the lower federal courts. While not directed at the members of this Court, its case-deciding function, or "judicial proceedings," such speech constitutes protected petitioning activity for which the grounds of this Court would be a particularly appropriate location. *Compare A Quaker Action Group v. Morton, supra*; *Jeannette Rankin Brigade v. Chief of the Capitol Police, supra*.

[11] Although the Government argues that the Court in *Cox II* was concerned *only* with the possible presence of nonjudicial officers (Gov't. Br. 10-11, 27), it is clear that the Court was speaking only by way of example and, in fact, was equally concerned with the possible presence of other potential listeners so long as the message was not intended, and would not appear, to affect "judicial proceedings."

Not only does the Government overlook the unique composition of the audience that might be reached on the grounds of the Court, but it also ignores the symbolic importance of this Court that renders it a unique place for the exercise of First Amendment rights. The federal judiciary is one of the three co-equal branches of our national government, and this Court has a singularly important role as the symbol of our Constitution, the rights and liberties protected by it, and our national devotion to the rule of law.

Commensurate with its special position in our national life, the Court possesses a unique character which renders it peculiarly suitable as a backdrop for certain expressive activity, particularly petitioning. As the United States Court of Appeals for the District of Columbia Circuit noted in rejecting the Government's argument that the Ellipse constituted a suitable alternative for those who wished to demonstrate at the White House, "[W]e cannot ignore the unique quality of demonstrations in front of the White House from the viewpoint of First Amendment interests." *A Quaker Action Group v. Morton*, 516 F.2d at 733 n.49a. The fact that protected demonstrative conduct would not be directed at this Court or its members does not make the Supreme Court any less unique or appropriate as the backdrop for expression. Thus, "[t]he alternatives . . . are far from satisfactory." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. at 93. Since "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schneider v. State*, 308 U.S. 147, 163 (1939), section 13k must fairly be read for what it purports to be—an absolute ban on demonstrative speech and conduct.[12]

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[12] As such, section 13k differs from the restrictions at issue in the cases on which the Government principally relies. *See* Govt. Br. 15-16. Section 13k does not merely restrict the use of some part of the Court's grounds, as did the restriction in *Adderley v. Florida*,

B. Section 13k Is Not Narrowly Drawn To Promote Compelling Governmental Interests.

In order to sustain section 13k's absolute ban on speech, the Government must bear the heavy burden of demonstrating that section 13k is narrowly drawn to advance some compelling governmental purpose. *See, e.g., Grayned v. City of Rockford*, 408 U.S. at 116-17. *See Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J. concurring). The Government has pointed to several interests that it asserts support the statute, but neither the Government's interest in the regulation of its own property nor its concededly substantial concern with the impartial administration of justice is sufficient to justify section 13k's unnecessarily broad prohibition of expression. And, there are a variety of less restrictive alternatives available that would amply serve to protect the Court against interference with its decisional process. Moreover, the Government's stated concern that any public expression of views

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385 U.S. 39 (1966), or regulate the time during which demonstrative conduct may occur as did the licensing requirement upheld in *Cox v. New Hampshire*, 312 U.S. 569 (1941). Nor does it simply prohibit noisy demonstrations, *see Grayned v. City of Rockford*, 408 U.S. 104 (1972), or the level of permitted sound amplification, *see Kovacs v. Cooper*, 336 U.S. 77 (1949). And unlike the rule in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), which required those soliciting contributions to do so in booths on the fairgrounds, section 13k does not allow demonstrative conduct anywhere on the grounds of the Court.

Moreover, the statute is not applied in a content-neutral fashion and thus could not, in any case, qualify as a valid time, place, or manner restriction. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. at 648. Contrary to the Government's assertion (Gov't. Br. 7), appellees have indeed made a showing that section 13k is discriminatorily enforced. *See, e.g.*, Appellees' Motion to Affirm at 9-10. The District Court and the Court of Appeals disposed of the case on other grounds and therefore had no occasion to address that issue. We note, however, that the clear evidence of selective enforcement presented in the proceedings below serves to demonstrate further the statute's underinclusiveness. *See* pp. 20-21 *infra*.

on the grounds of this Court may somehow compromise the Court as a symbol of calm solemnity and impartiality is a mere afterthought, which finds no support in the legislative history.

1. *Section 13k Cannot Be Justified by the Government's Interest in Regulating Public Property.*

The Court should first reject the contention (Gov't. Br. 17-21, 35) that the Government's burden of justification is sharply reduced where Congress seeks only to regulate or prohibit expression on public property. The fact that governmental property is involved is not dispositive, and conclusory labels—whether particular property is or is not a "public forum"—do not provide any additional justification for restrictions on speech above and beyond the underlying purpose of the statute.

In particular, the Government's attempt to equate its power to prohibit expression on the grounds of this Court with its power to regulate speech in the restricted environment of a jail or military base (Gov't. Br. 20-21) is clearly wrong. The degree to which restrictions on speech on public property are permissible is closely related to the Government's need generally to restrict public access to the property. Thus, streets and parks normally are open to the public, and the Government's need to restrict speech and expression in places where members of the public routinely are found is not great. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). By contrast, members of the public do not have free and unimpeded access to jails or military bases. Consistent with such restrictions—and the need to maintain order and discipline—speech in jails and military bases can be significantly restricted. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (jail); *Adderley v. Florida*, 385 U.S. 39 (1966) (jail); *Greer v. Spock*, 424 U.S. 828 (1976) (military base).

We do not understand the Government to suggest that, in general, public access to the Supreme Court

grounds is (or should be) significantly limited, as access is (and often must be) to a jail or military base. To the contrary, access to the grounds of the Court generally is not restricted at all—a public sidewalk runs the full perimeter of the Court's grounds. Although the absence of restrictions on public access may not automatically convert public property into a "public forum," *see Greer v. Spock*, 424 U.S. at 836, so also the absence of restricted access is fatal to the Government's assertion that it may prohibit expression without showing a substantial justification for the prohibition, *see Flower v. United States*, 407 U.S. 197 (1972) (per curiam). The Court of Appeals correctly identified the controlling legal principle:

> "[W]henever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest--whether the interest derives from the very nature of the property itself, or from some other source."

Grace v. Burger, 665 F.2d at 1202. Here, the Government has failed to provide such justification.

2. *Section 13k Is Not Narrowly Drawn To Protect the Government's Interest in the Impartial Administration of Justice.*

Although it is common ground that the Government has a substantial interest in protecting against actual or apparent interference in the administration of justice, the Constitution requires that the means used to promote such an interest be narrowly drawn to avoid the abridgment of First Amendment rights. As this Court cautioned in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968):

> "in the area of First Amendment rights [a statute] must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of

> the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

See also NAACP v. Claiborne Hardware Co., 50 U.S.L.W. 5122, 5131 (U.S. July 2, 1982).

Section 13k is clearly overbroad. The statute is not narrowly drawn, and it goes much further than is necessary to safeguard the Government's interest in protecting this Court against interference with the administration of justice. Indeed, the Government concedes in its Brief that section 13k prohibits a broad range of protected activity that could not have any adverse impact on that interest:

> "We recognize, of course, that a single leafleter or demonstrator—or, for that matter, most small crowds or a well-behaved large crowd—will usually not create an actual danger of real or perceived intimidation of the judiciary." [13]

Gov't. Br. 25 n.9. Thus, a single leafleter or demonstrator, three or four leafleters or demonstrators stationed at various points on the perimeter of the Court's grounds, or even a somewhat larger group of well-behaved demonstrators presents no possibility of harming the Government's interest. Section 13k, however, impermissibly prohibits each of these without distinction.

The existence of other less restrictive alternatives, apparently intended to accomplish the same goal, serves further to demonstrate that section 13k is not sufficiently narrowly drawn. Indeed, it is apparent that Congress intended to, and did, accomplish the very purpose now advanced by the Government in support of section 13k through

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[13] Thus, the Government appears to concede that, at a minimum, the statute was not constitutionally applied to the actions of appellees (Govt. Br. 25 n.9)—both of whom were individual leafleters.

its enactment of 18 U.S.C. § 1507.[14] As the legislative history indicates, section 1507 represents a considered determination by the Congress that the need to preserve the real and apparent impartiality of the federal judiciary, including this Court, does not, in the face of important First Amendment interests, require a complete ban on demonstrative activity.

Section 1507 is virtually identical to the Louisiana statute that was upheld in *Cox II*; it prohibits picketing or parading near a United States courthouse with the intent of influencing any judge or other court officer in the discharge of his duty or otherwise interfering with the administration of justice. Unlike the legislative history of section 13k, which evidences no consideration of the statute's constitutional implications, the legislative history of section 1507 reflects a full awareness of and accommodation of the important First Amendment rights involved. Thus, the Congress gave "[s]erious consideration . . . to the possibility that this legislation [§1507] would interfere with the fundamental rights of picketing and free speech." H.R. Rep. No. 1281, 81st Cong., 1st Sess. 3 (1949). Nevertheless, the Congress concluded that because the "statute does not interfere with those rights to such an extent as to render it unconstitutional . . . this bill is a proper and constitutional restriction on the right of picketing." *Id.* Accordingly, section 1507 is limited in scope and "denounces as a crime only that picketing, parading, or causing noises which interferes with the administration of justice." *Id.*

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[14] The Government's suggestion that section 1507 prohibits only the actions of demonstrators as to whom there is direct proof that they subjectively *intend* to influence the Court, but not the actions of those who may be *seen* as influencing the Court (Gov't. Br. 28), is baseless. As this Court noted in *Cox II*, the intent necessary to establish a violation of section 1507 may be inferred from evidence of any activity that reasonably may be seen as influencing the Court. *Cox II*, 379 U.S. at 567. Thus, section 1507 fully protects the Government's interest.

The Government's argument that section 13k is less restrictive of First Amendment rights than section 1507 is frivolous. Section 1507 may, as the Government suggests, require courts to examine the content of speech for certain purposes. But such examination is not unknown to the courts, which often must look to the content of expression when they are asked to determine whether a particular kind of speech is covered by the First Amendment.[15] *E.g., Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 538 n.5 (1980) (and cases cited therein). The analysis mandated by the intent requirement of section 1507 is in substance no different.

Of course, the judicial examination of content is a matter of great constitutional delicacy. But the Government's proposed cure is worse than the disease, since the Government's suggestion is that in order to avoid the risk inherent in prohibiting some speech, *all* speech should be banned. Gov't. Br. 28-31 & n.12. Although an absolute ban would reduce the administrative burden on courts and other officials, this Court has consistently held that fundamental rights may not be restricted merely for purposes of administrative convenience. *E.g., Oyama v. California*, 332 U.S. 633 (1948); *see Carrington v. Rash*, 380 U.S. 89, 96 (1965).

Even if section 1507 were not fully adequate to meet the Government's legitimate purposes, there are other less restrictive alternatives available that remove any need to resort to the absolute ban of section 13k. The size or manner of demonstrative conduct could be restricted or a limitation placed on the number of in-

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[15] For example, obscene material is distinguished from non-obscene on the basis of content, *e.g., New York v. Ferber*, 50 U.S.L.W. 5077, 5082 (U.S. July 2, 1982) and "the content of the utterance . . . determines whether it is a protected epithet or an unprotected 'fighting comment.'" *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976).

dividuals who would be allowed to engage simultaneously in such activity. In fact, many such restrictions now exist. For instance, 40 U.S.C. § 13j prohibits the making of any "harangue or oration" or using any "loud, threatening, or abusive language" in the Supreme Court building or on its grounds. Moreover, 40 U.S.C. § 13*l* empowers the Marshal to prescribe such regulations "as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds." [16] Given the existence of these less restrictive alternatives that fully meet the Government's legitimate interests, section 13k must give way to the protections of the First Amendment.

3. *Section 13k Cannot Be Justified on the Basis of Any Other Asserted Government Interest.*

In addition to its interest in preventing actual or apparent interference in the judicial process, the Government argues that the broad prohibition of section 13k is necessary in order to protect the symbolic importance of the grounds of this Court. Gov't. Br. 36-39. But the Government has not succeeded in demonstrating that section 13k was intended to do anything other than extend to the grounds of this Court the same restrictions that (at the time of its passage) already applied to the Capitol grounds. Thus, the rationale said to underlie section 13k—that Congress dedicated the Supreme Court

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[16] Of course, there would be nothing to prevent the Court from regulating expressive activity on its grounds pursuant to genuinely reasonable restrictions of time, place, or manner. There are now regulations that apply to both the White House and the Capitol. *See* 36 C.F.R. § 50.19 (1981), *as amended by* 46 Fed. Reg. 55,959 (1981), 47 Fed. Reg. 24,299 (1982) (White House); Traffic and Motor Vehicle Regulations for the United States Capitol Grounds (April 12, 1976) (Capitol).

grounds "as a symbol of the 'calmness and solemnity of the courtroom' . . . and the independence of the judicial branch from political pressure" (Gov't. Br. 37)—is merely a *post hoc* justification manufactured by Government counsel, and it should be given no weight by this Court.[17]

The meager legislative history of section 13k supplies no support for this claimed purpose. Nor is there any indication that, as the Government asserts, Congress determined that public demonstrations are "'basically incompatible with' these symbolic purposes."[18] Gov't. Br. 37. As Representative Emmanuel Celler, then Chairman of the House Judiciary Committee, stated on the floor of the House of Representatives: "[A]ll this bill does . . . is to apply the same rules to the Supreme Court building and its adjoining grounds as are now applicable to the Capitol itself—no more and no less." 95 Cong. Rec. 8962 (1949). The Committee Report similarly states "that in keeping with the dignity of the highest Court in the land, provision should be made for the policing of its building and grounds *similar to that which is made*

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[17] On previous occasions this Court has examined governmental interests asserted before it to determine whether they were in fact the legislative purpose. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 442-43 (1972). Moreover, where, as here, the legislative history clearly sets forth the legislative purpose, the Court has declined to look beyond that. *See Johnson v. Robison*, 415 U.S. 361, 376 (1974). *See also Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting).

[18] The Government also argues that Congress "chose to reduce discretionary enforcement [of 18 U.S.C. § 1507] by legislating, for the Supreme Court grounds, the more 'explicit standards' of Section 13k." Gov't. Br. 30. This argument derives no support from the legislative history and is merely another of the Government's speculative attempts to imagine some purpose for section 13k, no matter how implausible. Indeed, since section 1507 was enacted in 1950, one year after the enactment of section 13k, this argument is demonstrably incorrect.

for the United States Capitol." H.R. Rep. No. 814, 81st Cong., 1st Sess. 2 (1949) (emphasis added). *See* S. Rep. No. 719, 81st Cong., 1st Sess. (1949). Contrary to the Government's contention that Congress determined to treat the Supreme Court grounds differently from the grounds of the Capitol or the White House (Gov't. Br. 36-38), it is clear that Congress believed that the Court should be treated in this respect precisely the same as the other two branches of the government. The legislative history "demonstrates no particularized congressional concerns with either the fair administration of justice or public confidence in the judicial process." *Grace v. Burger*, 665 F.2d at 1203.

In any case, section 13k does not enhance or protect symbolic values to any significant degree. As the Government has repeatedly noted throughout its brief (Gov't. Br. 8, 10, 14, 15), section 13k leaves individuals free to leaflet and picket across the street from the Court. Such demonstrations are clearly visible from the Court grounds. *Id.* at 15. Thus, to the extent symbolic values are compromised at all, such demonstrations have no less of an effect than demonstrations on the grounds of the Court. This strongly suggests that Congress itself never viewed section 13k as furthering the symbolic interests that the Government now argues are so compelling.[19] The statute's patent underinclusiveness in relation to its asserted purpose confirms that Congress did not enact section 13k in order to serve the symbolic values as a "transcendent ob-

[19] It is true that, at the time section 13k originally was enacted, 40 U.S.C. § 193g prohibited all demonstrative conduct on the Capitol grounds, including across the street from the Supreme Court. But that statute was held to be unconstitutional in *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.) (3-judge court), *aff'd mem.*, 409 U.S. 972 (1972). In the ten years intervening between that decision and the present, Congress has failed to extend the scope of section 13k beyond the curb adjacent to the Court's grounds.

jective," *Carey v. Brown*, 447 U.S. 455, 465 (1980), requiring an absolute ban of expressive activity. *See id.*

Even if Congress had elected to dedicate the Supreme Court grounds to these symbolic values—which it did not—the courts have found similar objectives insufficiently compelling to justify similarly broad restrictions on expressive conduct on the grounds of the Capitol and the White House. In *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972) (a decision affirmed by this Court, 409 U.S. 972 (1972)) the court struck down a statute virtually identical to section 13k, finding that it was not justified by the Government's purported interests in maintaining "a park-like setting" and in the "glorification of a form of government through visual enhancement of its public buildings." 342 F. Supp. at 585. And in *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975), the court held that, in light of the unique importance of the White House for First Amendment purposes, the Government's interest in the security of the President and the White House was not sufficiently compelling to justify an unreasonable limitation on the number of people who could demonstrate in Lafayette Park or on the sidewalk in front of the White House. Thus, the absolute prohibition of expression imposed by section 13k cannot be justified by any asserted interest in maintaining the dignity and decorum of this Court.[20] Accordingly, section 13k is unconstitutionally overbroad.

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[20] The Government argues that demonstrations near the Capitol or the White House grounds may be constitutionally protected even though those near a courthouse are not. Gov't. Br. 37 n.15. The difference, says the Government, is that courts, unlike the legislative or executive branches, should be immune to "political pressure." Gov't. Br. 37. But as this Court held in *Cox II*, the Government's interest in restricting speech that is intended to exert such pressure justifies only a narrow restriction of expression, and section 1507 fully protects that interest.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals and hold 40 U.S.C. § 13k unconstitutional under the First Amendment.

Respectfully submitted,

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